In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
MAY 26 1945
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 917 91

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,

Petitioner,

vs.

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

GEORGE OLSHAUSEN,
Mills Tower, San Francisco 4, California,
Attorney for Petitioner.

ABRAHAM SETZER,
Merchants Exchange Building, San Francisco 4, California,
Of Counsel.

Subject Index

	Page
Petition for Writ of Certiorari	1
Summary Statement of Matter Involved	2
Reasons Relied on for Issuance of Writ	5
Brief	6
Prayer	6
Brief in Support of Petition for Writ of Certiorari	9
I. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court	13
A. Defendant's acts may be held unreasonable	13
B. The attack on Pearl Harbor was equivalent to war	14
C. Philippines and Hawaii affected equally	17
II. Alternatively, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this court	18
III. If the Circuit Court of Appeals has reweighed the facts it has decided contrary to applicable decisions of this court and contrary to other circuits	19
IV. Conclusion	21

Table of Authorities Cited

Cases

Pages

Columbia Nat. Ins. Co. v. Comfort, 84 Fed. (2d) 291 (C. C. A. 8) 21

Gunning v. Cooley, 281 U. S. 90 20

Helvering v. Johnson, 104 Fed. (2d) 140 (C. C. A. 8, aff'd 308 U. S. 523) 20

Kawasaki K.K.K. v. Bantham S.S. Co. (1939), 2 KB 544.. 16
Kronprinzessin Cecilie, 244 U. S. 12 .....5, 13, 14, 15, 17, 18, 19

Lumbra v. U. S., 290 U. S. 551 20

The Styria, 186 U. S. 1 .....5, 12, 13, 14, 16, 17, 18, 19

U. S. v. Gamble-Skogmo, 91 Fed. (2d) 372 (C. C. A. 8) 20
U. S. v. Ingalls, 114 Fed. (2d) 839 (App. D. C.) 20

Codes and Statutes

55 Stats. 795 15

28 USCA 347(a) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. .....

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,
Petitioner,

vs.

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Jack E. Ellis respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Ap-

peals for the Ninth Circuit. The Circuit Court of Appeals (Healy and Mathews, CJJ; Garrecht, CJ, dissenting) rendered its decision March 1, 1945 (R. 675) and denied a rehearing April 4, 1945. (R. 677.) The judgment (not yet reported) reversed a judgment of the District Court for the Northern District of California, Southern Division (Goodman, DJ) for the recovery in an action in detinue, of petitioner's (plaintiff's) goods, or in the alternative for the value thereof, and for damages for the unlawful detention by the De La Rama Steamship Co., Inc., a corporation, of said goods withheld by said steamship company under a claimed lien for alleged freight charges. Original and amended memorandum opinions of the District Court appear at R. 594 and 596, its findings of fact and conclusions of law at R. 596-608.

The case comes up from the law side of the Court, having been removed from the Superior Court of the State of California on grounds of diversity of citizenship. (R. 22; see R. 12, respondent's petition for removal, stating that the case is one at common law.) The record on appeal was filed in the Circuit Court of Appeals. The majority opinion of that Court appears at R. 664-74, the dissenting opinion of Judge Garrecht at R. 674-5. The United States Supreme Court has jurisdiction under 28 USCA 347(a).

SUMMARY STATEMENT OF MATTER INVOLVED.

The parties will hereafter be referred to by their trial Court denominations of plaintiff and defendant.

Plaintiff Jack E. Ellis, a resident of San Francisco, California, is an exporter and importer, doing business as General Export Company, exporting and importing to and from the Philippine Islands, Hong Kong, China, Straits Settlements and Java, prior to the attack on Pearl Harbor and the war with Japan. Defendant The De La Rama Steamship Co., Inc., is a Philippine corporation, a common carrier by water, carrying between ports of the United States and ports of the Far East, including the Philippine Islands. In the latter part of *November 1941* plaintiff had a cargo of common glassware originating in Indiana, to be shipped via New York to Manila and Cebu, Philippine Islands, and Hong Kong. The glassware remained in the possession of plaintiff's agent, the Erie Railroad, aboard lighters, until *12:45 P.M., Eastern War Time, Sunday, December 7, 1941,* when the defendant steamship company issued docks receipts therefor to the lightermen, each of which provided, among other matters, as follows:

> "Neither the company nor the vessel on which the goods are subsequently loaded shall become responsible for the goods as carrier until actually loaded."

and removed said glassware to its docking facility, Pier 2, Erie Basin, Brooklyn, N. Y. The glassware was to be carried under bills of lading not executed and issued by the steamship company until *December 11, 1941,* which contained prepaid freight clauses providing that freight should be earned "on shipment of the goods and is to be retained by carrier, cargo lost or not lost, or if there be a forced interruption or

abandonment of voyage at a port of distress or elsewhere."

On *December 7, 1941,* defendant's vessel M/S Dona Aniceta was being loaded at New York. Plaintiff's cargo was on the dock. The defendant's New York Port Captain, in charge of the loading of said vessel and of the defendant's affairs at said docking and shipping facility received the news of the Japanese attack on Pearl Harbor, but continued loading as if nothing had happened. The District Judge found that *all* of plaintiff's cargo was loaded *after* knowledge of the Pearl Harbor attack. (Finding VII, R. 604.) Clearance of the vessel was refused on the morning of December 8, 1941, and the vessel was ultimately requisitioned on December 31. She never sailed on behalf of defendant. The defendant claimed full freight from New York to the ultimate Far Eastern destinations of plaintiff's glassware, under the foregoing prepaid freight clause. When this was not forthcoming it withheld, despite plaintiff's demand, and still withholds, his goods for a claimed freight lien. Plaintiff sued for the return of his glassware, or its value if the return of the specific personal property could not be had and for damages for its alleged unlawful detention.

The District Judge found as a fact that defendant was not justified in proceeding to load plaintiff's goods (without consulting plaintiff, who was in San Francisco) after knowledge of events at Pearl Harbor. (Finding VI, R. 602-3.) The District Judge accordingly held that defendant could not claim the

freight asserted; that plaintiff was not indebted to the defendant therefor, and that the defendant had no freight lien. Judgment went for the plaintiff for the return of his glassware or in the alternative for its value if such recovery could not be had and for damages for defendant's unlawful detention thereof. The Circuit Court of Appeals reversed by a 2-1 decision. It held that the situation had to be judged as of the time that the carrier had to make its decision and that *as a matter of law* there was no basis for holding that the carrier should have known that it would be exposed to a greater risk or might not be able to sail. (Another possible interpretation of the majority opinion—that the Circuit Court of Appeals attempts to *reweigh the facts*—is also discussed hereinafter.)

REASONS RELIED ON FOR ISSUANCE OF WRIT.

A writ of certiorari should issue for the following reasons:

1. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court. The majority opinion cites and relies on *The Styria,* 186 U. S. 1, but in effect decides contrary to it; likewise contrary to the *Kronprinzessin Cecilie,* 244 U. S. 12.

2. Alternatively, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. *The Styria* and *Kronprinzessin Cecilie* (and all authorities cited by the majority of the Circuit Court of Appeals)

were cases where the carrier *refused* to carry into a war zone. In the present case the carrier says it *planned to carry.* The precise question in the earlier cases was under what conditions the carrier had a *right* to refuse to sail. The precise question in the present case is, under what conditions may a carrier be held to have *a duty not to sail,* or at least to consult its shippers before moving their cargo. If this difference is thought to distinguish the earlier holdings, the instant case presents an important federal question, not yet decided.

3. If the Circuit Court's opinion be construed as *reweighing the facts,* then its decision is in conflict with the applicable decisions of this Court, or alternatively, of other circuits. Heretofore it has been the accepted rule that *in a law appeal,* if more than one inference is reasonably deducible from undisputed facts, the question of which inference to draw, itself, presents an issue of fact on which the holding of the trial judge is final.

BRIEF.

A supporting brief is attached to this petition.

PRAYER.

Wherefore, your petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the Circuit Court of Appeals commanding said Court to certify and send to this Court on a day

certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said court "No. 10,701, The De La Rama Steamship Co., Inc., a corporation vs. Jack E. Ellis, an individual doing business under the fictitious firm name and style of General Export Company", to the end that said cause may be reviewed and determined by this Court as provided by law, and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court and that the judgment of the District Court may be affirmed.

Dated, San Francisco, California,
May 25, 1945.

GEORGE OLSHAUSEN,
Attorney for Petitioner.

ABRAHAM SETZER,
Of Counsel.

CERTIFICATE OF COUNSEL.

George Olshausen, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

GEORGE OLSHAUSEN.

Subscribed and sworn to before me this 25th day of May, 1945.

(Seal) THOMAS A. DAUGHERTY,
Notary Public in and for the City and County of San Francisco, State of California.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. .....

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,
Petitioner,

vs.

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Circuit Court of Appeals discusses several points in its opinion, but decides the case on the question whether the defendant was justified in loading plaintiff's cargo after defendant received knowledge of the attack on Pearl Harbor.

We first mention these other points, merely to get them out of the way. The Circuit Court refers to the dock receipts under which the defendant had the cargo

on the dock. It then proceeds on the theory, that liability for freight did not attach until, at least, the commencement of the loading of plaintiff's goods on board the vessel.

Second, the Circuit Court goes into a long discussion of some of the evidence touching the trial Court's finding VII (that all of plaintiff's cargo was loaded after defendant had knowledge of the Pearl Harbor attack (R. 604)). However, it decides the case on the assumption that the said finding is supported by evidence.*

The Circuit Court of Appeals majority then recites that the defendant's traffic manager and its New York Port Captain, both received notice of the Pearl Harbor attack in New York, on the afternoon of December 7, 1941. It is said at R. 667:

> "Griffin, appellant's freight traffic manager, heard the Pearl Harbor news over his radio about 2:30 P. M. of the 7th *but he did nothing with regard to the Dona Aniceta* on that day. *Captain Meredith did not consult with his superiors.*"

(R. 668):

> "According to the testimony of this official [Suewer] as well as that of Griffin and Meredith there were no changes in the plans for the Dona Aniceta after news of the Pearl Harbor attack."

(R. 670):

> "The [trial] court thought it an unreasonable exercise of judgment on appellant's part to load

*The record contains ample evidence to support this finding. A 3½ page resumé is given in the appendix to this brief.

> the glassware after receipt of news of the Pearl Harbor attack. 'Simple realism', it was felt, militated against any expectation that the voyage could be carried out." (Italics added.)

The Circuit Court of Appeals' majority opinion then adverts to declarations of the government of its intention to *convoy* ships across the Pacific, and says that the refusal of clearance on December 8th was "not conclusive" because "obviously temporary". (R. 672.) There is also recital of considerable evidence (R. 671) showing that defendant did intend to sail the vessel across the Pacific—as if the fact that defendant had the intention, itself tended to prove the intention to be reasonable. In this connection there are included the observations that (R. 670):

> "Naturally, insurance rates went sharply up."

(R. 671):

> "Suewer testified that *perhaps an American or English line would not have felt as his company did about sailing to the Philippines* but even though such lines might have thought it best not to sail, his own, he said, would probably not have followed suit." (Italics added.)

The Japanese attack on Pearl Harbor is thought by the majority of the Circuit Court of Appeals not equivalent to a declaration of war, or formal embargo, nor to have the same legal consequences, it being said (R. 673):

> "The argument is that the attack on Pearl Harbor by the government of Japan constituted automatically a restraint on shipping—The Jap-

> anese attack we think was not a restraint of princes in the sense of the Rotterdamsche Lloyd decision [298 Fed. 443] where the restraint had been imposed by the Netherlands government on its own nationals, and unknown to shippers was in effect when cargo was solicited. There is scant resemblance, legally or factually, between the two situations."

From this, the Circuit Court of Appeals concluded that, *as a matter of law,* there was no basis for the trial Court's finding that the intention to sail was unreasonable (R. 671):

> "The query is whether this was a reasonable purpose, or whether, however laudable, it was so at war with known conditions as to exhibit mere wishful thinking."

(R. 670):

> "With due deference to the opinion of the trial court, we are not able to agree that the responsible agents of the carrier acted arbitrarily in light of the facts coming to their knowledge while cargo was in process of being loaded. The Court is obliged to put itself in the position of the actors 'and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate.' The Styria, 186 U.S. 1, 9".

The District Court had relied on *The Styria,* as authority for the opposite conclusion. (R. 596.)

We now briefly discuss the three grounds set forth in the petition.

I. THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Styria, 186 U.S. 1, and *The Kronprinzessin Cecilie,* 244 U.S. 12, both discuss the rights between shipper and carrier sailing into a probable war zone, when war has broken out or is imminent. In both, the carrier *refused to sail.* In both, this action of the carrier was held justifiable. In the present case the Circuit Court of Appeals holds that *as a matter of law* there is no support for a finding that under similar circumstances the carrier should not have tried to sail, or at least, should not have tried to sail without first consulting the shipper.

A. DEFENDANT'S ACTS MAY BE HELD UNREASONABLE.

1. First, the fact that similar circumstances have been held to justify the carrier in refusing to sail, points to an inferential argument that such circumstances support a finding of fact that the carrier *should not have tried* to sail in this case.

2. But *The Styria* goes further than merely holding a refusal to sail to be justifiable. It repeatedly characterizes the contrary action, quoting with approval the following language from the lower Court or earlier cases:

> (p. 13) "Under such circumstances the owner of contraband cargo (loaded as this was, before war broke out) could with reason insist that it would be *gross negligence* on the part of the ship to bring his cargo forward."
>
> (p. 17) " 'I am satisfied that if the master had continued the voyage with the goods on board, he

> would have been acting *recklessly'*." (Italics added.)

(*The Styria* involved contraband cargo on a neutral ship. The present case involves the vessel of a nation about to become a belligerent. Both sides and both lower Courts in the instant case agree that the situations are analogous. On this phase *The Kronprinzessin Cecilie* has the same facts as the case at bar.)

The Styria also denounces the action of the master in proceeding to load without consulting his superiors (p. 20):

> "The master in either case would have acted *imprudently* if he had not secured the approval of the shipowners, if it were possible to get it before the emergency." (Italics added.)

Thus, the present case presents conduct which this Court characterizes as "gross negligence", "reckless" and "imprudent". This view certainly justifies a finding (such as made by the District Court) that such conduct was *unreasonable as a matter of fact.* In holding to the contrary, the Circuit Court of Appeals has misinterpreted and misapplied *The Styria,* 186 U. S. 1. *The Kronprinzessin Cecilie,* 244 U. S. 12, is to the same effect as *The Styria.*

B. THE ATTACK ON PEARL HARBOR WAS EQUIVALENT TO WAR.

The holding that the attack on Pearl Harbor did not have the same legal effects as a formal declaration of war is directly contrary to both *The Kronprinzessin Cecilie* and *The Styria.*

In *The Kronprinzessin Cecilie* it is said (244 U. S. 12, 22):

> "No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all."

(p. 24):

> "We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he is never at liberty to anticipate war."

The same thing holds true in the present case. Everybody knew that the Pearl Harbor attack meant war.

The Declaration of War itself purported merely to declare a State of War which was already existing:

> Joint Resolution—55 Stats. 795.
>
> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and people of the United States of America; Therefore be it resolved:
>
> That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination, all the resources of the Country are hereby pledged by the Congress of the United States.

The Styria contains language which, if anything, goes further (p. 18):

> "It was said that the fear of seizure however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* LR7QB 404 and *Rodoconachi v. Elliott* LR9CP 518. *The goods were as effectually stopped at Hong Kong as if there had been an express order of the Chinese government that contraband of war shoud be landed.*" (Italics added.)

The Styria is based partly on British authorities. Recent English cases are even more pointedly to the same effect:

> *Kawasaki K.K.K. v. Bantham S.S. Co.* [1939], 2 KB 544,

(p. 556):

> "Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war."

(p. 557):

> "If my view is right that the fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out, then the matter becomes a question of fact and the arbitrator has found as a fact, in so far as it is a matter of fact, that the animus belligerandi existed."

The Pearl Harbor attack therefore constituted as much a restraint on shipping as a formal declaration of war or a direct seizure.

C. PHILIPPINES AND HAWAII AFFECTED EQUALLY.

There is some discussion in the majority opinion as to whether the defendant steamship company was informed that war had broken out over the Philippines, as well as Hawaii. This distinction certainly cannot upset a finding of fact. We submit it is not valid from any standpoint. If the war zone extended from Japan to Hawaii, *a fortiori* it would extend to the much nearer Philippines. Furthermore, the distinction if valid, would apply only to vessels sailing west-east to the Philippines (across the Atlantic and Indian Oceans). A vessel sailing east-west across the Pacific would have to pass the neighborhood of the Hawaiian Islands in order to reach the Philippines, so would sail *through* the war zone whether the Philippines were under attack or not. It must always be remembered that the District Judge found defendant's intention of sailing to be unreasonable as a matter of fact. The question is whether that finding is supported by evidence. Both *The Styria* and *The Kronprinzessin Cecilie* hold that the prudent thing under such circumstances is not to sail. The inference follows, that an intention to sail under the same circumstances may be held to be unreasonable. In holding the contrary the Circuit Court of Appeals erred.

II. ALTERNATIVELY, THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

So far we have discussed *The Styria* and *The Kronprinzessin Cecilie* on the assumption that they lay down correlative rights and obligations for a carrier by water when war breaks out or becomes imminent. Circumstances which give a carrier the right to refuse to sail, also place upon it the duty to refuse, or at least to consult with shippers before proceeding with the voyage.

If this is not so, then the issue of unreasonableness, where the carrier *plans to sail* (instead of refusing) is one not heretofore decided by this Court. The statements in *The Styria* that the carrier's conduct would be "gross negligence", "reckless", "imprudent", would be *dicta*. But if it should be assumed that the question is of first impression, the Circuit Court of Appeals has decided squarely contrary to the *dicta* of this Court in *The Styria*.

We may add one further observation. All of the cases cited on this point by the Circuit Court of Appeals (R. 670) are cases in which the carrier *refused* to sail, and the refusal was upheld. They are used by the Circuit Court as authority for upholding the carrier's action in this case where the carrier *planned* to sail. Such use of authorities based on opposite actions of the carrier implies that the result must always be the same regardless of what the carrier has done.

This, we submit is contrary to the holding as well as the *dicta* of *The Styria*, and contrary to the reasoning which underlies both that case and *The Kronprinzessin Cecilie*.

III. IF THE CIRCUIT COURT OF APPEALS HAS REWEIGHED THE FACTS IT HAS DECIDED CONTRARY TO APPLICABLE DECISIONS OF THIS COURT AND CONTRARY TO OTHER CIRCUITS.

So far we have treated the Circuit Court of Appeals' majority opinion as holding that as a matter of law the facts of the case do not furnish a basis for the trial Court's finding that the carrier's intended sailing was unreasonable.

If the majority opinion should be construed as reweighing the inferences which are to be drawn from the facts then it is contrary to the decisions of this Court (and to other circuits which have passed on the question). The general rule that in a law appeal the findings of the trier of the facts upon conflicting evidence, are final, is unquestioned. The narrower point here involved is that even where evidence is uncontradicted, if more than one inference may reasonably be drawn from the uncontradicted evidence, the question of which inference to draw is likewise a question of fact on which the trier's finding is final. The concrete issue is whether upon the undisputed facts defendant's intention to sail was reasonable or unreasonable. Justice Garrecht's dissenting opinion makes the point that the trial judge's answer to this question

has the same status as a finding upon conflicting evidence (R. 675):

> "such findings have the same force and effect as the verdict of a jury, the same conclusiveness, especially in cases where the important testimony is oral and where the trial judge had the opportunity to observe the witnesses and judge their veracity. Findings of fact will not be disturbed by the appellate court unless they are so clearly contrary to the evidence as to produce in the mind of the reviewers a conviction amounting to a reasonable certainty that they are wrong.
>
> "In the lower Court's finding that the appellant acted in an unreasonable manner in loading the cargo after the knowledge of the attack on Pearl Harbor, I fail to find clear error. The decision of the lower court should be affirmed."

The rule that the proper inference to be drawn from uncontradicted evidence is to be treated as a question of fact is laid down in the following cases:

Lumbra v. U. S., 290 U. S. 551, 553;
Gunning v. Cooley, 281 U. S. 90, 94.

If, for any reason these cases should be thought inconclusive, then the following cases from circuits other than the Ninth, establish a conflict among the circuits:

U. S. v. Ingalls, 114 Fed. (2d) 839, 842 (App. D. C.);
Helvering v. Johnson, 104 Fed. (2d) 140, 141 (C. C. A. 8, aff'd. 308 U. S. 523);
U. S. v. Gamble-Skogmo, 91 Fed. (2d) 372, 374 (C. C. A. 8);

Columbia Nat. Ins. Co. v. Comfort, 84 Fed. (2d) 291, 292 (C. C. A. 8).

In short, if the majority opinion be construed to reweigh the trial Court's inferences drawn from evidence, certiorari should be granted upon the ground of conflict with applicable decisions of this Court, or, in any event, upon the ground of conflict among the circuits.

V. CONCLUSION.

Certiorari should be granted for the reasons hereinabove set forth. Upon full consideration the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Dated, San Francisco, California,
May 25, 1945.

Respectfully submitted,
GEORGE OLSHAUSEN,
Attorney for Petitioner.

ABRAHAM SETZER,
Of Counsel.

(Appendix Follows.)

Appendix

Evidence supporting Finding VII (R. 604) that all of plaintiff's cargo was loaded after defendant had knowledge of Pearl Harbor attack. (All references to *defense* evidence unless otherwise indicated.)

1. Time when knowledge was acquired.

The Circuit Court of Appeals says that defendant's New York Port Captain learned of the Pearl Harbor attack "sometime before 3:00 p.m. on the 7th." Captain Meredith's testimony is that he learned it between 1 and 2 P.M. on the 7th:

(R. 157-8):

"Q. When did you learn of the incident now called the attack on Pearl Harbor?

A. Mrs. Meredith called me up.

Q. At what time?

A. That I do not clearly remember; sometime in the afternoon.

Q. To the best of your recollection what time during the afternoon?

A. I think it was between 1:00 and 2:00 o'clock.

Q. Between 1:00 and 2:00 P.M.?

A. Yes."

2. Time of loading.

Plaintiff's Exhibit 12 (letter from H. J. Griffin, appellant's then Freight Traffic Manager):

(R. 361):

"The cargo in question was delivered to our Pier on December 6, 1941, and loaded into the subject vessel on December 8th."

Defendant's Exhibit P (Bill of Lading allegedly tendered but refused by plaintiff; facing R. 62, see also R. 479):

"Laden on Board Dec 8 1941 E. J. H."

The date "Dec 8 1941" was put on this document by defendant's agents. (R. 500b.) The initials "E.J.H." are the initials of defendant's employee and witness Elmer J. Hult. (R. 500b.) (The Circuit Court of Appeals overlooked this witness when it said at R. 673, ftn. 7a, that "all testimony for appellant except that of Griffin was by deposition".)

The loading was completed at noon of December 8. (Hennessy, R. 308.)

Had the loading been consecutive it would have been about a five-hour job. (Meredith, R. 168.)

(If nothing more were available it may reasonably be inferred that a job taking 5 hours all told, and completed at 12:00 noon on December 8th, was begun later than 2:00 or even 3:00 P.M. of the previous day.)

In answers to interrogatories defendant originally placed the time of commencement of loading at 1:00 P.M. on December 7th, and the time of completion at 5:00 A.M. on December 8th (R. 99, Ans. 28) a spread of 16 hours. Later the time of completion was corrected to 12:00 noon of the 8th. (Hennessy, R. 307-8.) Assuming the spread of 16 hours to be correct, this would place the time of commencement at 8:00 P.M. on December 7th.

The cargo being glassware, had to be stowed on top (so last, on each deck of each hold):

(Meredith, R. 169):

> "A. Glassware would come in the category of general cargo calling for top stowage, so that there would be no weight liable to break it."

One of the dock checkers explained away the dates "Dec 7 1941", appearing on dock checkers' freight-loading tally sheets which defendant introduced in evidence:

(Lanagan, R. 318-d):

> "* * * you see the way we generally work here, you start in say at 8 o'clock this morning, you work all night and you work all day the next day. So you might put a date on the tally, like say if we start this morning, I might put today's date on and just continue on the tally and it would go over to the next day, on the same tally."

The so-called "agreement" mentioned by the Circuit Court (R. 667) that loading started at 1:00 P.M. on the 7th was nothing more than a stipulation *by defendant* as to the earliest time *claimed by defendant* for the commencement of the loading:

(R. 591):

> "Mr. Morse. Yes, in that I can. I will stipulate that Mr. Ryan was in error when he stated that he loaded glassware prior to breakfast on December 7, and I will also make the statement to the Court that, not unlike some waterfront employees, he was somewhat intoxicated when the deposition was taken.

The Court. When do you say the record now shown, according to the defendant's testimony, the loading took place?

Mr. Morse. Commencing at one o'clock p.m. on December 7 and it was completed by noon of December 8—the glassware.

The Court. Do you want to dispute that?

Mr. Stetzer. In view of that statement, your Honor, I do not have to give any more concern about the matter if you so state."

At any rate, the stipulation was such that the trial judge could reasonably construe it as stated above.

Due service and receipt of a copy of the within is hereby admitted

this_____day of May, 1945.

_____

_____

_____

Attorneys for Respondent.

(54)

JUL 5 1945

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 317 91

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,

Petitioner,

against

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK J. FOLEY,
80 Broad Street,
New York 4, N. Y.,
Attorney for Respondent.

HERBERT M. STATT,
80 Broad Street,
New York 4, N. Y.,

CLARENCE G. MORSE,
310 Sansome Street,
San Francisco 4, Cal.,
of Counsel.

INDEX

PAGE

POINT I—The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved... 1

POINT II—The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings..... 2

POINT III—The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same subject 2

POINT IV—No authority or other reasons for granting petition are stated by petition and none in fact exists 2

ARGUMENT 2

CONCLUSION 8

CASES CITED

PAGE

Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377 6

Associated Cement Mfrs. v. Cory, 31 Times L. R. 442 5

Carlisle Packing Co. v. Sandanger, 259 U. S. 255 1

Fleming v. Palmer, 123 F. (2d) 749 8

George J. Goulandris, The, 36 F. Supp. 827 6

Graves v. Miami S. S. Co., 29 Misc. (N. Y.) 645 5

Hall-Scott Motor Car Co. v. Universal Ins. Co., 122 F. (2d) 531, 534 1

International Paper Co. v. The Gracie D. Chambers, 248 U. S. 387 6

Kawasaki v. Bantham S. S. Co., L. R. (1939) 2 K. B. 544 5

Kronprinzessin Cecilie, The, 244 U. S. 12 5

Kuhn v. Princess, 119 F. (2d) 704 8

Laurent Meeus, The, 133 F. (2d) 552 ..... 4, 6

Luckenbach S. S. Co. v. Grace & Co., 267 Fed. 676 5

Ocean Steamship Co. v. U. S. Steel Products Co., 239 Fed. 823 4

Paraffine v. McEverlast, 84 F. (2d) 335, 339 7

Pollard v. Vinton, 105 U. S. 7, 9 4

Standard Varnish Works v. The Bris, 248 U. S. 392 6

Styria, The, 186 U. S. 1 ..... 4, 5, 6

Tatsuuma Kisen Kabushiki Kaisha v. Robert Dollar Co., 31 F. (2d) 401, 402 1

Union Fish Co. v. Erickson, 248 U. S. 308 1

Wildwood, The, 133 F. (2d) 765 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1317

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,

Petitioner,

against

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

No question is presented by the petition for writ of certiorari justifying the granting of such petition.

POINT I

The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved.

Union Fish Co. v. *Erickson,* 248 U. S. 308;
Carlisle Packing Co. v. *Sandanger,* 259 U. S. 255;
Tatsuuma Kisen Kabushiki Kaisha v. *Robert Dollar Co.,* 31 F. (2d) 401, 402;
Hall-Scott Motor Car Co. v. *Universal Ins. Co.,* 122 F. (2d) 531, 534.

POINT II

The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

POINT III

The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same subject.

POINT IV

No authority or other reasons for granting the petition are stated by petitioner and none in fact exists.

ARGUMENT

This case involves the right of a shipowner under a maritime contract of bill of lading to receive and retain prepaid freight, under the provisions of an appropriate bill of lading clause, the voyage having been delayed and ultimately frustrated by the act of the United States Government in requisitioning its vessel, *M. S. Dona Aniceta,* after the cargo had been loaded but before the vessel had departed.

The clause in question reads:

> "Freight for the said goods to be paid by the shippers on delivery of Bills of Lading, in cash without deduction.
>
> "Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the carrier, cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere; * * *."

The validity of the prepaid freight clause was not questioned by the Circuit Court or by petitioner (Rec., p. 669).

The shipment of glassware in question was to have moved from New York City to ports in the Philippine Islands and Hong Kong on the scheduled December 8, 1941, sailing of respondent's *M. S. Dona Aniceta.*

Respondent's witnesses testified by deposition that petitioner's cargo was loaded from the dock into respondent's *Dona Aniceta* during the period from December 6 to noon, December 8, 1941 (Rec., pp. 309-327c). The veracity of these witnesses is apparent from a casual reading of their depositions. *It was stipulated and agreed by and between counsel for each of the parties that petitioner's cargo was loaded between 1 P. M., December 7, and noon, December 8, 1941* (Rec., pp. 566, 589).

The sailing of the vessel on December 8, 1941, was delayed that day by temporary refusal of clearance and on following days by orders from the United States Maritime Commission to arm and degauss the vessel. The voyage was frustrated on December 31, 1941, by orders of the United States Maritime Commission to discharge all cargo and to charter the vessel to the Maritime Commission.

As the Circuit Court of Appeals found, it became necessary to discharge and warehouse petitioner's cargo of glassware on December 31st, when the ship "was requisitioned for the Government through the War Shipping Administration and ordered to discharge her cargo" (Rec., p. 669).

Although petitioner, a man of experience in Far Eastern affairs (Rec., pp. 416-C), was as fully informed of the diplomatic and belligerent status of Japan and the United States as was respondent, petitioner issued no instructions to the respondent to refrain from loading his cargo. His position was precisely the same as that of numerous other shippers to which respondent owed an obligation to transport, none of whom gave any instructions not to load their merchandise (Rec., p. 670), several requesting that the loading be completed.

It is conceded by the petitioner that the *Dona Aniceta* was a Philippine vessel and the respondent was a Philippine corporation. Respondent's responsible officials at all times until December 31, 1941, when the vessel was requisitioned by the United States, intended to sail the vessel on her voyage. These officials relied upon many reports in the press that shipping in the Pacific would be normal or increased (Rec., pp. 532, 543) and on the news that the Philippines had not been affected at the time of their decision.

The Circuit Court of Appeals concluded, on the authority of *Ocean Steamship Co.* v. *U. S. Steel Products Co.* (C. C. A. 2), 239 Fed. 823; *Pollard* v. *Vinton,* 105 U. S. 7, 9, and *The Laurent Meeus,* 133 F. (2d) 552, that in effect it made no difference, so far as concerned the principles of the case, whether the cargo was loaded before or after the so-called attack on Pearl Harbor:

> "We find it unnecessary to appraise the effect of the dock receipts" (Rec., p. 670).

If it was reasonable for the petitioner to believe that the *Dona Aniceta* would sail on the voyage under the circumstances which prevailed prior to loading the cargo, it is obvious that petitioner cannot recover. Realizing that the respondent was not endowed with that prescience which petitioner seems to endeavor to force upon it, and that the matter must be considered from the viewpoint of the actors, *The Styria,* 186 U. S. 1, the Circuit Court of Appeals (Rec., pp. 670-674) found the actions of respondent's officials fully supported by the knowledge of the circumstances available to them and cited *The Styria, supra,* as authority for the proposition that it is appropriate for businessmen to rely upon knowledge current in their trade and upon publications shedding light upon the facts in which they are interested. In the present case the newspaper reports are of peculiar relevance because of the testimony of respondent's witnesses that their actions were guided, for the most part, by the information which they gleaned

from them. Since under the bill of lading and under legal authorities a "discretion" lies with the master and owner whether or not to abandon the voyage in the event of an extraordinary occurrence, it is obvious that within the sound discretion of the master and owner they may conclude either (a) that the circumstances necessitate an abandonment of the voyage, or (b) that the circumstances are not of such import as to permit them to do anything but to perform the contract of carriage and proceed with the voyage. In the present instance the Circuit Court of Appeals found that the case fell within the latter class.

The attack on Pearl Harbor did not mean to the respondent, nor to the petitioner, that the cargo which had been laden on the *Dona Aniceta* would not be moved, particularly since there were reports prevalent that ships would move in convoy and the vessel herself was instructed to arm and "institute defensive measures" (Rec., p. 668). Again, no report indicated that the vessel's Philippine ports had been affected by war (Rec., p. 287).

Petitioner apparently contends that any state of international affairs which may be considered a state of war, *ipso facto* constitutes a restraint on the performance of the voyage. Petitioner cites no authority for that proposition, but instead attempts to distort *The Styria, supra,* and *Kawasaki* v. *Bantham S. S. Co.* (1939), 2 K. B. 544, into decisions supporting that erroneous conclusion.

The mere fact that after the goods were delivered to the respondent a state of war ensued between the United States and Japan did not abrogate the contract of carriage nor excuse performance.

> *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, 267 Fed. 676, 679 C. C. A. 4, cert. den. 254 U. S. 644.
>
> *Associated Cement Mfrs.* v. *Cory*, 31 Times L. R. 442.
>
> *Graves* v. *Miami S. S. Co.*, 29 Misc. (N. Y.) 645.

The decision to sail, as here, or not to sail, as in *The Styria* and *The Kronprinzessin Cecilie*, is necessarily de-

pendent upon the multitude of assembled facts, each of which necessarily has a bearing upon the reasonableness. The absence of a vital determinative fact or the presence of another may mark the direction in which the decision falls. The respondent was bound to continue performance of the contract *unless prevented* by an excepted cause.

The record demonstrates clearly that petitioner had, in the form of continuous consultation with the carrier with regard to the status of his goods, ample opportunity to give such instructions as he deemed advisable; he failed to take advantage of such opportunity but, on the contrary, now, as a matter of afterthought, endeavors to place upon the carrier the obligation of making such a decision for him at the carrier's risk of choosing the decision which appeals to him.

The decision in this case and the principles involved therein is on all fours with the decisions based on similar facts in *The Laurent Meeus*, 133 F. (2d) 552, *The Wildwood*, 133 F. (2d) 765, *The George J. Goulandris*, 36 F. Supp. 827, *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U. S. 377, *International Paper Co.* v. *The Gracie D. Chambers*, id. 387, *Standard Varnish Works* v. *The Bris*, id. 392, and a contrary finding would do great violence to the principles upon which the shipping world generally proceeds. There is no need for any assumption that the question here involved is of first impression. It is not correct to say that "the Circuit Court of Appeals has decided contrary to the *dicta* of this Court in *The Styria*".

There is no conflict or variance between the decision in this Court and the decisions on the same principles of any other Court.

Judge Garrecht's dissenting opinion was obviously based upon his view that the Circuit Court of Appeals was bound by the finding below, "especially in cases where the important testimony is oral and where the trial judge had the opportunity to observe the witnesses and judge their veracity" (Rec., p. 675).

The basis for the dissenting Judge's conclusion is obviously erroneous as the *important* testimony was by deposition. The effect of the testimony of the few oral witnesses was largely cumulative. There was absolutely no testimony by deposition or in open court which opposed the finding of the Circuit Court of Appeals that respondent intended "to sail the vessel immediately upon completion of the New York loading unless instructions to the contrary were received either from American authorities or from Manila. Its conduct prior to the requisitioning of the ship is consistent only with the purpose to proceed with the scheduled voyage unless subsequent developments should prevent" (Rec. p. 671). A contrary finding by the District Court was completely unsupported by any evidence. In any event, there is no presumption in favor of a trial court's findings where all the substantial evidence to support them is produced by way of depositions or other writings. *Paraffine* v. *McEverlast*, 84 F. (2d) 335, 339.

The Circuit Court of Appeals was not, of course, bound to accept the findings of the District Court if it considered those findings clearly erroneous. F. R. C. P. Rule 52(a). In the present instance, the Circuit Court of Appeals stated in its opinion (R. p. 670):

> "With due deference to the opinion of the Trial Court, we are not able to agree that the responsible agents of the carrier acted arbitrarily in light of the facts coming to their knowledge while cargo was in process of being loaded."

Petitioner's entire case was based on a finding of unreasonableness by the District Court and, on the reversal of that finding, petitioner's entire case falls with it.

At page 6 of the petition and at page 19 of petitioner's brief it is claimed that the Circuit Court of Appeals had no right to reweigh the facts and apparently was bound by the findings of the District Court no matter how clearly erroneous they might be. Such a conclusion will not bear a moment's examination.

Fleming v. *Palmer*, 123 F. (2d) 749 (C. C. A. 1), cert. denied 316 U. S. 662.
Kuhn v. *Princess*, 119 F. (2d) 704 (C. C. A. 3).

The cases cited by petitioner do not support the proposition contended for.

Lumbra v. *U. S.*, 290 U. S. 551, and *Gunning* v. *Cooley*, 281 U. S. 90, were cases tried to a jury.

In *U. S.* v. *Ingalls*, 114 F. (2d) 839, it was said at page 842:

> "Where two different conclusions may reasonably be drawn from uncontroverted evidence, the question as to which should be drawn is for the trial court * * *."

It does not, of course, follow from the above statement that the Circuit Court of Appeals is bound to accept a conclusion of the District Court which it considers clearly erroneous.

Helvering v. *Johnson*, 104 F. (2d) 140, was a petition to review a decision of the United States Board of Tax Appeals and not an appeal from a decision of the District Court.

United States v. *Gamble-Skogmo, Inc.*, 91 F. (2d) 372, and *Columbia National Ins.* v. *Comfort*, 84 F. (2d) 291, were appeals heard in 1937 before the Federal Rules of Civil Procedure were in effect, and are consequently not in point.

CONCLUSION

It is respectfully requested that this Honorable Court deny the petition for writ of certiorari.

Dated: New York, N. Y., June 27, 1945.

Respectfully submitted,

FRANK J. FOLEY,
Attorney for Respondent.

HERBERT M. STATT,
CLARENCE G. MORSE,
of Counsel.